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6 **UNITED STATES DISTRICT COURT**  
7 **DISTRICT OF NEVADA**  
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9 LAMALSIKOU LOWE,  
10

11 *Petitioner,*

12 vs.

13 JAMES M. SCHOMIG, *et al.*,

14 *Respondents.*

2:04-cv-01034-JCM-RJJ

15 ORDER

16 This represented habeas action under 28 U.S.C. § 2254 comes before the Court on  
17 the respondents' motion (#34) to dismiss. Respondents contend that Ground 2(B) is not  
18 exhausted and that Ground 1 is barred by procedural default. The Court similarly will address  
19 the exhaustion issue as to Ground 2(B) first.

20 ***Exhaustion of Ground 2(B)***

21 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust his state court  
22 remedies on a claim before presenting that claim to the federal courts. To satisfy this  
23 exhaustion requirement, the claim must have been fairly presented to the state courts  
24 completely through to the highest court available, in this case the Supreme Court of Nevada.

25 *E.g., Peterson v. Lampert*, 319 F.3d 1153, 1156 (9<sup>th</sup> Cir. 2003)(*en banc*); *Vang v. Nevada*,  
26 329 F.3d 1069, 1075 (9<sup>th</sup> Cir. 2003). In the state courts, the petitioner must refer to the  
27 specific federal constitutional guarantee and must also state the facts that entitle the  
28 petitioner to relief on the federal constitutional claim. *E.g., Shumway v. Payne*, 223 F.3d 983,

1 987 (9<sup>th</sup> Cir. 2000). That is, fair presentation requires that the petitioner present the state  
 2 courts with both the operative facts and the federal legal theory upon which his claim is  
 3 based. *E.g., Kelly v. Small*, 315 F.3d 1063, 1066 (9<sup>th</sup> Cir. 2003). The exhaustion requirement  
 4 accordingly insures that the state courts, as a matter of federal-state comity, will have the first  
 5 opportunity to pass upon and correct alleged violations of federal constitutional guarantees.  
 6 See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 731, 111 S.Ct. 2546, 2554-55, 115 L.Ed.2d  
 7 640 (1991).

8 Under *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), a mixed  
 9 petition presenting both exhausted and unexhausted claims must be dismissed without  
 10 prejudice unless the petitioner dismisses the unexhausted claims or seeks other appropriate  
 11 relief.

12 Petitioner concedes that Ground 2(B) "was not raised in state court." Petitioner  
 13 asserts, however, "that this claim is fully exhausted because there is an absence of any  
 14 available state corrective process at this time." He maintains that "any state post-conviction  
 15 petition filed at this stage of the proceeding would be denied as untimely under" N.R.S.  
 16 34.726(1). He further maintains that "any state post-conviction petition filed at this stage  
 17 would be dismissed as successive under" N.R.S. 34.810. Petitioner accordingly contends that  
 18 the exhaustion requirement is satisfied because there is no available state remedy because  
 19 he procedurally defaulted the claim in state court. #38, at 5-6.

20 The Court will not hold that this claim is exhausted in the absence of an unequivocal  
 21 stipulation by petitioner that Ground 2(B) in fact would be denied as untimely and/or  
 22 successive if he returned to state court to present the claim. Any holding of exhaustion on  
 23 this basis further will be subject to the State's ability to then move to dismiss the claim on the  
 24 basis of procedural default.<sup>1</sup>

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 26 <sup>1</sup>See *Morrison v. Mahoney*, 399 F.3d 1042, 1045-47 (9<sup>th</sup> Cir. 2005)(the State does not impliedly waive  
 27 the procedural default affirmative defense by not raising the defense in an initial motion to dismiss); *United  
 28 States v. Valdez* 195 F.3d 544, 548 (9<sup>th</sup> Cir. 1999)(similar). The Court notes that the Supreme Court recently  
 held that a district court could raise the federal time-bar defense *sua sponte* even after the State expressly  
 (continued...)

Such an unequivocal stipulation, to in truth be unequivocal in light of the application of the procedural default rules under current Nevada state post-conviction procedure, must include concessions that: (1) petitioner cannot avoid dismissal of the claim in the state courts because he cannot demonstrate cause and prejudice in the state courts to overcome these procedural bars;<sup>2</sup> (2) petitioner cannot avoid dismissal of the claim in the state courts because he cannot demonstrate in the state courts that the alleged constitutional violation has probably resulted in the conviction of one who is actually innocent and cannot thereby overcome these procedural bars;<sup>3</sup> and (3) the procedural bars otherwise are now consistently applied by the Nevada state courts, such that it is not possible that the state courts, as a discretionary matter, would consider the claim despite the procedural default and despite a failure to demonstrate either cause and prejudice or actual innocence.

12 In the absence of such concessions, the Court will not hold that there is no possibility  
13 that the unexhausted claim would be considered by the state courts in Nevada.

## ***Procedural Default as to Ground 1***

15 Under the procedural default doctrine, federal review of a habeas claim may be barred  
16 if the state courts rejected the claim on an independent and adequate state law ground due  
17 to a procedural default by the petitioner. Review of a defaulted claim will be barred even if  
18 the state court also rejected the claim on the merits in the same decision. Federal habeas  
19 review will be barred unless the petitioner can demonstrate either: (a) cause for the

<sup>1</sup>(...continued)

21 conceded in its answer that the petition was timely. See *Day v. McDonough*, 126 S.Ct. 1675 (2006). As a  
22 general matter, the circumstances under which the limitation and procedural default affirmative defenses  
23 must be raised by the State or can be raised by the district court *sua sponte* are the same for one defense as  
they are for the other. See, e.g., *Herbst v. Cook*, 260 F.3d 1039, 1043 (9<sup>th</sup> Cir. 2001).

<sup>24</sup> See, e.g., *Mitchell v. State*, 149 P.3d 33, 36 (Nev. 2006) (“A petitioner can overcome the bar to an untimely or successive petition by showing good cause and prejudice.”); see also *Robinson v. Ignacio*, 360 F.3d 1044, 1052 n.3 (9<sup>th</sup> Cir. 2004) (recognizing that Nevada’s cause and prejudice analysis and the federal cause and prejudice analysis are nearly identical).

<sup>3</sup>See, e.g., *Mitchell*, 149 P.3d at 36 (“Even when a petitioner cannot show good cause sufficient to overcome the bars to an untimely or successive petition, habeas relief may still be granted if the petitioner can demonstrate that ‘a constitutional violation has probably resulted in the conviction of one who is actually innocent.’” *citing Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)).

1 procedural default and actual prejudice from the alleged violation of federal law; or (b) that  
 2 a fundamental miscarriage of justice will result in the absence of review. *See, e.g., Bennet v.*  
 3 *Mueller*, 322 F.3d 573, 580 (9<sup>th</sup> Cir. 2003). To demonstrate cause for a procedural default,  
 4 the petitioner must establish that some external and objective factor impeded his efforts to  
 5 comply with the state's procedural rule. *E.g., Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct.  
 6 2639, 2645, 91 L.Ed.2d 397 (1986); *Hivala v. Wood*, 195 F.3d 1098, 1105 (9<sup>th</sup> Cir. 1999). To  
 7 satisfy the prejudice requirement, he must show that the alleged error resulted in actual harm.  
 8 *E.g., Vickers v. Stewart*, 144 F.3d 613, 617 (9<sup>th</sup> Cir. 1998). Both cause and prejudice must  
 9 be established. *Murray*, 477 U.S. at 494, 106 S.Ct. at 2649.

10 In Ground 1, petitioner alleges that the evidence was insufficient to sustain his  
 11 conviction. Respondents contend that petitioner raised only a state law challenge to the  
 12 sufficiency of the evidence on direct appeal. Respondents further contend that his federal law  
 13 challenge to the sufficiency of the evidence is procedurally defaulted because the Supreme  
 14 Court of Nevada later declined to hear his federal insufficient evidence claim on state post-  
 15 conviction review under the Nevada law of the case doctrine.<sup>4</sup>

16 Petitioner contends, *inter alia*, that he in fact exhausted the federal insufficient  
 17 evidence claim on direct appeal because the federal and state standards for sufficiency of the  
 18 evidence are identical. He further contends that the state law of the case doctrine does not  
 19 operate as a procedural bar when the state courts refuse to again hear a claim that they  
 20 previously have heard.

21 The Court is persuaded by the petitioner's arguments. In *Sanders v. Ryder*, 342 F.3d  
 22 991 (9<sup>th</sup> Cir. 2003), the Ninth Circuit based a holding that a federal ineffective assistance of  
 23 counsel claim had been exhausted by the assertion of an ineffective assistance claim in state  
 24 court on, *inter alia*, the fact that the Washington state courts analyzed both federal and state

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 26 <sup>4</sup>See #27, Ex. 39, at 9-17 (direct appeal brief); #28, Ex. 43, at 4-5 (Nevada Supreme Court order on  
 27 direct appeal); #29, Ex. 55, at 6 (order of affirmance on state post-conviction appeal). The 2001 counseled  
 28 brief on direct appeal did not expressly invoke federal law on the insufficient evidence claim, and the brief  
 cited a 1974 Nevada Supreme Court decision for the governing standard. The state law case predated the  
 leading federal decision in *Jackson v. Virginia* by five years.

1 law ineffective assistance claims under the very same *Strickland*<sup>5</sup> standard. 342 F.3d at 999-  
 2 1000. The *Sanders* court noted that it had become commonplace for the Washington state  
 3 courts simply to refer to “ineffective assistance of counsel” claims without specifying whether  
 4 the claims were state or federal claims. *Id.*, at 1000. *Sanders* is distinguished by, *inter alia*,  
 5 the fact that the document relied upon for exhaustion in that case was a *pro se* filing.  
 6 However, the Court is persuaded that the Ninth Circuit would follow *Sanders* and hold that,  
 7 standing alone, the assertion of a claim in state court where federal and state standards are  
 8 not merely similar but instead are wholly identical exhausts the federal claim.

9 In reviewing Nevada case law, this Court has not been able to discern any difference  
 10 whatsoever between the federal and state standards applied to a challenge to the sufficiency  
 11 of the evidence supporting a judgment of conviction. The federal standard under *Jackson v.*  
 12 *Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), is applied by the Nevada state  
 13 courts apparently without regard to whether the challenge is expressly designated by the  
 14 appellant as a “federal” or as a “state” claim. See, e.g., *Koza v. State*, 100 Nev. 245, 250-51,  
 15 681 P.2d 44, 47 (1984). Indeed, in the present case, on direct appeal, without any express  
 16 invocation by Lowe of federal law, the standard of review applied by the Supreme Court of  
 17 Nevada came virtually verbatim from *Jackson v. Virginia*. One of the state cases that the  
 18 court cited for this standard in turn cited directly to *Jackson v. Virginia* as the source for the  
 19 governing standard. See *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). It thus  
 20 is clear that the standard applied to Lowe’s insufficient evidence claim was the very same  
 21 *Jackson v. Virginia* standard that is applied to a claim expressly designated as a federal claim.

22 The Court can see no reason to find a claim unexhausted when the claim has been  
 23 reviewed by the state courts under the identical standard applied to a claim expressly  
 24 designated as a federal claim. Such a claim has been fairly presented to the state courts and  
 25 in fact fully reviewed by those courts. The Court therefore holds that Ground 1 is exhausted.

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28 <sup>5</sup>*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

1       Accordingly, when the Supreme Court of Nevada applied the Nevada law of the case  
2 doctrine to the insufficient evidence claim presented on state post-conviction review, it was  
3 applying the doctrine to bar the relitigation of a claim that had been actually decided on the  
4 previous direct appeal. When a state court relies upon law of the case to preclude relitigation  
5 of a claim that previously was actually raised and rejected on direct appeal, the application  
6 of such a relitigation bar has no effect on federal habeas review. In such a situation, the  
7 constitutional claim actually was exhausted and adjudicated on the merits; and the claim  
8 therefore is subject to federal habeas review notwithstanding a subsequent refusal to again  
9 consider the constitutional claim later on state post-conviction review. See, e.g., *Calderon v.*  
10 *United States District Court*, 96 F.3d 1126, 1131 (9<sup>th</sup> Cir. 1996). The bar merely to relitigation  
11 of the actually-adjudicated claim does not constitute a procedural bar to federal review of the  
12 claim. *Id.*

13       The Court therefore holds that Ground 1 is not procedurally defaulted.

14       IT THEREFORE IS ORDERED that respondents' motion (#34) to dismiss will be  
15 GRANTED IN PART and DENIED IN PART, as per the remaining provisions of this order.  
16 On the record presently before the Court, Ground 2(B) is not exhausted.

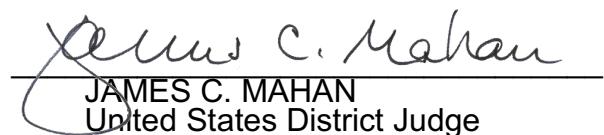
17       IT FURTHER IS ORDERED that the represented petitioner shall have thirty (30) days  
18 from the date of entry of this order to file either:

- 19               (1) a motion for dismissal without prejudice of the  
20                   entire petition, for partial dismissal only of Ground  
21                   2(B), and/or for other appropriate relief; or
- 22               (2) an unequivocal stipulation that Ground 2(B) in fact  
23                   would be denied as untimely and/or successive if  
24                   he returned to state court to present the claim, in  
25                   which he expressly concedes that: (a) petitioner  
26                   cannot avoid dismissal of the claim in the state  
27                   courts because he cannot demonstrate cause and  
28                   prejudice in the state courts to overcome these

1 procedural bars; (b) petitioner cannot avoid  
2 dismissal of the claim in the state courts because  
3 he cannot demonstrate in the state courts that the  
4 alleged constitutional violation has probably  
5 resulted in the conviction of one who is actually  
6 innocent and cannot thereby overcome these  
7 procedural bars; and © the procedural bars  
8 otherwise are now consistently applied by the  
9 Nevada state courts, such that it is not possible that  
10 the state courts, as a discretionary matter, would  
11 consider the claim despite the procedural default  
12 and despite a failure to demonstrate either cause  
13 and prejudice or actual innocence.

14 Any motion or stipulation filed must contain or be accompanied by, either contemporaneously  
15 or via a document filed within ten (10) days thereafter, a signed declaration by the petitioner  
16 under penalty of perjury pursuant to 28 U.S.C. § 1746 that he has conferred with his counsel  
17 in this matter regarding his options, that he has read the motion or stipulation, and that he has  
18 authorized that the relief sought therein be requested or that the stipulation and concessions  
19 therein be made. The entire petition will be dismissed without prejudice for lack of complete  
20 exhaustion if a motion and/or the required verification is not timely filed.

21 DATED this 7<sup>th</sup> day of March, 2007.

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25 JAMES C. MAHAN  
26 United States District Judge  
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